Office-Supreme Court, U.S.
FILED
MAR 8 1983
CLERK

NO. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, Director
Texas Department of Corrections,
Respondent.

BRIEF OF AMICUS CURIAE TEXAS CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION

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I

QUESTION PRESENTED

This case presents the question of what standard should be applied in granting or denying stays of execution pending disposition of appeals by death-sentenced habeas petitioners[1].

1. By focusing on this single procedural issue common to all death-sentenced habeas petitioners, Amicus Curiae does not intend to imply that we would not join with the claims relating to the merits of this particular appeal.

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BRIEF OF AMICUS CURIAE TEXAS CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION

INTEREST OF *AMICUS CURIAE*

The Texas and American Civil Liberties Union appear as *amicus curiae* with the written consent of both parties, given in letters which have been forwarded to the Clerk of this Court. *Amicus Curiae* are non-partisan membership organizations which have exhibited a long-standing interest in protecting Constitutional rights of the criminally accused, with participation at some level in some 26 of the over 160 death penalty cases now before Courts in the State of Texas.

Of primary importance to *Amicus Curiae* are the substantial and recurring issues relating to obtaining stays of execution in death penalty cases, and the impact that resolution of these questions will have upon the many similarly situated death-sentenced Petitioners in Texas and throughout the nation.

The process by which federal courts review a death-sentenced petitioner's first federal appeal of his federal Constitutional claims is one of vital importance. *Amicus Curiae* have an interest in insuring that first-time, non-frivolous federal habeas appeals of federal Constitutional claims are given plenary review on their merits by the Courts of Appeal.

ARGUMENT

The District Court's issuance of a certificate of probable cause to appeal Thomas A. Barefoot's habeas petition at the very least amounted to a finding that his appeal was not frivolous. *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967) [requiring consideration of merits of appeal where probable cause for appeal demonstrated]; *Carafas v. LaVallee*, 391 U.S. 234, 242; *Garrison v. Patterson*, 391 U.S. 464, 466 (1968); *Stewart v. Beto*, 454 F.2d 268, 270, n. 2 (5th Cir. 1971) [holding that certificate of probable cause amounts to a "substantial showing of the denial of (a) federal right"]; *Clements v. Wainwright*, 648 F.2d 979, 981 (5th Cir. 1981); *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977); *Gross v. Bishop*, 377 F.2d 492 (8th Cir. 1967); *Glynn v. Donnelly*, 485 F.2d 692, 693 (1st Cir. 1973); *Dobbert v. Strickland*, 670 F.2d 938, 939 (11th Cir. 1982); Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255*

and Habeas Corpus Cases, 43 F.R.D. 343, 351-2 (1968) ["(T)he test for granting a certificate of probable cause . . . requires something more than the absence of frivolity and the standard is a higher one than . . . 'good faith' "].

The Opinion of the Court of Appeals herein took apparent pain not to find Barefoot's appeal frivolous,[2] and their denial of a stay of execution left pending his non-frivolous appeal for calendaring and review on the Court's normal docket. To permit Barefoot's execution, while his non-frivolous appeal is still pending orderly Appellate review, is to render moot the questions therein presented.

Because of the unique and irrevocable nature of the penalty of death, denial of a stay of execution under these circumstances, is tantamount to dismissal of the appeal. Accordingly, where a certificate of probable cause to appeal has been issued, a stay should be granted until the merits are heard, unless Respondents demonstrate that said appeal meets the requirements for dismissal of that appeal.

> "If there is probable cause to appeal it would be a mockery of federal justice to execute [a petitioner] pending its consideration." *Foquette v. Bernard,* 198 F.2d 96, 97 (9th Cir. 1952); see: *Brooks v. Estelle,* ____U.S.____ (December 6, 1982) [Justices Brennan, Marshal and Stevens, dissenting].

An appeal may be dismissed where it is found to be frivolous and entirely without merit. *Harkins v. Eldridge,* 505 F.2d 802 (8th Cir. 1974); *Moist v. Belk,* 380 F.2d

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2. The precise language of the Court of Appeals was that it found "no patent substantial merit or semblance thereof." *Barefoot v. Estelle,* ____F.2d____, Slip Op. at p. 16 (5th Cir. Jan. 20, 1983).

721 (6th Cir. 1967), cert. den. 389 U.S. 960. See: Wright and Miller, Federal Practice and Procedure, § 3011, p. 398. And the Fifth Circuit's Local Rule 20 provides that such a determination may be made "upon the hearing of any interlocutory motion".

> "RULE 20. FRIVOLOUS AND UNMERITORIOUS APPEALS
>
> If upon the hearing of any interlocutory motion or as a result of a review under Rule 14, it shall appear to the Court that the appeal is frivolous and entirely without merit, the appeal will be dismissed." See: *U.S. v. Sheppard* (5th Cir. 1982) 688 F.2d 952, at 953; *U.S. v. Reyna* (5th Cir. 1977) 548 F.2d 1154, at p. 1155; *U.S. v. Minor* (5th Cir. 1971), 444 F.2d 521, at 523.

The hearing below, on application for stay of execution, was such an interlocutory motion and yet the Court of Appeals chose not to enter a finding of frivolousness or to dismiss Barefoot's appeal pursuant to its own procedures. To the contrary, the Court merely denied the stay without disturbing the district court's finding of probable cause to appeal. This would allow Petitioner's execution while his presumptively non-frivolous appeal was pending before them.

The presumptive effect of the district court's issuance of a certificate of probable cause was a matter briefed and argued by *Amicus* to the Court of Appeals in *Brooks v. Estelle*, ____F.2d____, Slip 2460 (5th Cir. December 6, 1982) [Amicus Texas Civil Liberties Union's Memorandum in Support of Application for Reconsideration of Order Denying Stay of Execution, filed therein].

However, this issue was not presented to this Court by Brooks' Application for Stay,[3] nor was it addressed by this Court's majority opinion therein. *Brooks v. Estelle,* ____U.S.____ (December 6, 1982).

Despite Judge Reavely's suggestion below that "since six members of the Court denied the petition for stay" in *Brooks,* the dissentors' argument "must have been rejected", this Court has often opted not to determine cases on issues not adequately presented or addressed by the parties. *Ryan v. U.S.,* 379 U.S. 61 (1964); *Pierson v. Ray,* 386 U.S. 547 (1967); *U.S. v. O'Brien,* 391 U.S. 367 (1968), reh. den. 393 U.S. 900. In any event the majority in *Brooks* did not speak to this issue, and it is now squarely before the Court.

The Court below also suggests that to give "too much weight to the district court's issuance of the certificate" would in effect abrogate the "appellate court's responsibility to decide the merits of the stay" under Rule 8, F. R. App. P. *Barefoot v. Estelle, supra,* Slip at p. 4.

However, because a petitioner's execution will render any appeal moot, not to give at least presumptive effect to such a certificate will totally eviscerate the right to appeal granted by 28 U.S.C. § 2253 where the required "certificate of probable cause" has issued. See also: Rule 22, F. R. Cr. P.

Accordingly, unless there is a finding that the issuance of the certificate of probable cause is "clearly erroneous", a stay should be granted to protect the appellate court's jurisdiction to give plenary review to the merits of that appeal.

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3. Amicus bears considerable responsibility for having failed to seek review and present this issue to this Honorable Court in that cause.

THE INHERENT TENSION BETWEEN RULE 8 AND § 2253 IN DEATH PENALTY CASES

Rule 8 of the Federal Rules of Appellate Procedure governs the granting or denial of stays in civil cases generally. Title 28 U.S.C. § 2253 grants habeas corpus petitioners the right to appeal the denial of their § 2254 claims where a "certificate of probable cause to appeal" has been issued by the district court.

The Court of Appeal's concern for its "responsibility to decide the merits of a stay" under Rule 8, F.R.App.P., *Barefoot v. Estelle, supra,* Slip at p. 4, cannot foreclose its obligation to hear the merits of the appeal which is granted as a matter of statutory right under 28 U.S.C. § 2253.

Particularly in death penalty cases, the Congressionally granted right to appeal the denial of a § 2254 petition where a certificate of probable cause has issued, should take precedence over any inherent judicial authority to determine stays, whether prescribed by the Court's rules or not. See: *Therntron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976) and Advisory Committee Notes to Rule 1 of the Federal Rules of Appellate Procedure which suggests that "Rules 22 through 24" are to control. Otherwise, the appellate court's determination of the stay issue under Rule 8 [which is primarily concerned with stays of execution in civil cases] may preclude the plenary review of the merits of a statutory appeal under § 2253, simply because the party at interest has been executed before his case is heard.

In *Dobbert v. Strickland,* 670 F.2d 938 (11th Cir. 1982) the Court was confronted with a similar situation

where "[T]he district court issued a certificate of probable cause under 28 U.S.C. § 2253, but denied a stay of execution of sentence". *Dobbert v. Strickland, supra,* at p. 939. The Eleventh Circuit Court of Appeals granted the stay noting that:

> "Unless the execution of sentence is stayed in this case, the issues on appeal would become moot, and defendant would never have his day in court on constitutional issues". *Dobbert v. Strickland, supra,* at p. 940.

This Court has indicated that in order to deny "the parties full opportunity to submit briefs" and argue the merits of an appeal, "despite the issuance of the certificate of probable cause", said appeal must be "frivolous". *Carafas v. LaVallee,* 391 U.S. 234, at p. 242 (1968); *Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158 (5th Cir. 1969).

> "Anything less than this, as we held in *Nowakowski,* would negate the office of the certificate of probable cause." *Carafas v. LaVallee, supra,* at p. 242.

Here, as in *Dobbert v. Strickland, supra,* "[P]etitioner's application for a writ of habeas corpus is his *first* assertion of most of his constitutional arguments in *federal court*" and "[u]nless the execution of sentence is stayed in this case, the issues on appeal would become moot, and defendant would never have his day in this court on his constitutional issues." (emphasis supplied) at p. 940.

Without the benefit of briefs on the merits, the time constraints imposed by accelerated schedules and abbreviated consideration on the stay papers alone would fore-

close the courts of appeal from the "fine-tuned inquiry into the actual merits" which is required prior to imposition of the punishment of death. *Shaw v. Martin,* 613 F.2d 492 (4th Cir. 1980).

There is something special about the first federal appeal of the denial of a habeas petition raising federal constitutional issues in a death penalty case. It does not represent an attempt to relitigate an issue already decided by the same tribunal before which it is pending. *Shaw v. Martin, supra,* at p. 491. Rather such "a pending appeal in the United States Court of Appeals from the denial by the district court of the *first* petition for writ of habeas corpus" is a well-accepted, traditional avenue of post-conviction review of state court convictions which is "so well established" as to be "counted among the basic protections" accorded any accused. At p. 491. More importantly, it is a right to appellate review which should not be "mooted" by the execution of an accused against whom that ultimate punishment has been imposed.

> "To deny a stay . . . would be to prevent the following first instance decisions being made in matters now actually pending in the courts, each is an accepted, traditional avenue of post-conviction review of state court criminal convictions: 1) a pending petition for rehearing of the denial of certiorari by the Supreme Court of the United States; 2) *a pending appeal in the United States Court of Appeals from the denial by the district court of a first petition for habeas corpus;* 3) a pending post-conviction proceeding in the state court system. None of these represents an attempt to relitigate an issue already decided by the same tribunal before which it is pending. Each, as indicated, lies within avenues of review so long and so well established that they must

> be counted among the basic 'protections' with which our system has 'surrounded' all persons convicted of crime. Under these circumstances it seems imperative . . . that the jurisdiction of these courts to address the issues already regularly pending before them must be preserved against mooting by execution of the death sentence." *Shaw v. Martin, supra,* at p. 491.

This is the first federal appeal of Barefoot's first federal habeas claim.

In a death penalty case the failure to grant a stay will have the effect of divesting the court of its jurisdiction to hear a statutory appeal under § 2253, where the Petitioner is executed, even though the district court's finding of "probable cause to appeal" is not disturbed.

CONCLUSION

The anomalous result of permitting the execution of a petitioner, while his presumptively non-frivolous appeal challenging that death sentence is still pending is unconscionable and should not be tolerated by this Honorable Court.

Clear-cut, well established procedures should be set down requiring Courts of Appeal to grant stays of execution in appeals of first-time federal habeas claims where a certificate of probable cause to appeal has been issued, unless Respondents demonstrate that the issuance of such certificate was "clearly erroneous".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above foregoing Brief of Amicus Curiae, Texas Civil Liberties Union and American Civil Liberties Union, has been mailed by certified mail, Return Receipt Requested, to Mr. Douglas M. Becker, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711, counsel for respondents and Mr. Will Gray, Attorney at Law, 2038 Lexington Street, Houston, Texas, on this the 5th day of March, 1983.

GERALD H. GOLDSTEIN